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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5979

DONNIE B. McMANUS and RALPH JONES,
Petitioners,

versus

STATE OF LOUISIANA,
Respondent.

RESPONSE IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana

LeROY A. HARTLEY
Special Counsel To Attorney General

JOHN A. RICHARDSON
District Attorney
First Judicial District of Louisiana

DAN J. GRADY III
Assistant District Attorney

Counsel for Respondent
500 Caddo Parish Court House
Shreveport, Louisiana 71101

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SUMMARY OF ARGUMENT
RULE 40(1)(f)

At about 3:00 AM on August 20, 1970, a citizen living in the Southern Hills area of the City of Shreveport, Louisiana, reported having seen a prowler leaving a new but unoccupied house across the street from her own. The prowler left the area in a U-Haul panel truck. The investigating officer radioed a description of the truck to other patrol units.

A few minutes later, another patrol officer spotted a U-Haul panel truck travelling on a road which passes through Southern Hills, and coming from the direction

of Southern Hills. He followed the truck to a service station about a half mile south of the city limits.

The officer inquired of the occupants of the truck as to their identity, their recent whereabouts and the contents of the truck. The two men identified themselves, stated that a third occupant was in the restroom, denied having been in Southern Hills, and stated that the truck contained two air conditioners which they had purchased from an unknown man at a bar at about midnight.

The officer looked through the rear windows of the truck, using his flashlight, and observed two central air conditioner compressor units, partially covered with furniture pads, and which appeared to have been cut loose from their connections instead of disconnected. The officer then found that the two men had no papers for the air conditioners or the truck, and that they were on their way to a town south of Shreveport to sell the units. They explained that the truck had been rented by a neighbor of the driver, and that they had borrowed it for the evening.

The officer radioed for supervisory assistance, and requested the officer in Southern Hills to check the area for missing air conditioners.

A supervisor arrived at the service station, and, after learning the circumstances, denied the officer permission to arrest the two men. It was then discovered that the third occupant of the truck had slipped out of the restroom and disappeared. The officer renewed his re-

quest to arrest, and was again denied permission. He then requested permission to obtain the serial numbers of the units, and was assisted in getting the numbers by the driver of the truck.

The officer in Southern Hills then reported by radio that he had located two houses in Southern Hills, about five or six blocks from the prowler incident, from which the air conditioners were missing. Both houses were new and unoccupied. This officer, during the course of his search at one of the houses, found that the light meter had been removed from the side of the house and thrown into the yard. He placed it on the porch, completed his search, recovered the meter, and subsequently brought it to police headquarters where it was ultimately processed for latent prints.

Upon receipt of this officer's report, the supervisory officer telephoned police headquarters and conferred with a detective. Afterwards, he inquired of the occupants of the truck whether they would voluntarily go to police headquarters to determine the ownership of the air conditioners. The two men complied, and all departed the service station for the police station. The truck was parked unattended on the police parking lot while everyone went inside.

The two men were taken to a detective. The supervisor went about his business. The officer went to Central Records where he seached for reports of air conditioner theft.

The detective interviewed the two men briefly, learned their identity, and found that they still gave the same story about the air conditioners which they had given at the service station. He left them alone and went about checking their story.

The officer in Central Records found a report of a theft of an air conditioner from a house in Southern Hills that had occurred a few days previously. The serial number of the missing unit was one digit different from the number on one of the units in the truck. He called the owner, and found that the unit in the truck had been installed to replace the previously stolen unit, and that it had been in place at 6:00 PM the previous evening.

The officer gave this information to the detective, and the two men were placed under arrest and given their rights. Thereafter they remained silent, and were booked and printed.

The second air conditioner in the truck was found to belong to another builder and was in place the previous evening at a new house in Huntington Park Subdivision, another subdivision bordering on the same road upon which the truck was first spotted by officers, but further to the west (the truck was eastbound when found).

Immediately after placing the two under arrest, the detective went off duty. A second detective took up the investigation, again gave the two men their rights, and again the men remained silent. The detective then went

to the truck, seized the units, and found a hacksaw on the floor of the truck, which he also seized.

The units were photographed and then returned to their proper owners; but the sawed pieces of copper tubing were removed, and, together with the hacksaw, delivered to the crime lab for analysis.

The light meter ultimately yielded a palm print which was matched to the palm of one of the occupants of the truck.

In a motion to suppress evidence, and again at trial, the defendants objected to all evidence, complaining of unlawful search, seizure and arrest. They further complained of failure to establish the chain of custody of the light meter because it was left for a while on the porch of the house where it was found. And they further complained of a break in the chain of custody of the copper tubing and hacksaw because the truck was left unattended for a time on the police parking lot. Further, during trial, they complained of the testimony of the State's crime lab expert, who stated that the copper tubing had been sawed through and that the hacksaw blade contained fragments of copper, although he could not say that the copper in the saw came from the tubing or that the saw had cut the tubing. And their last complaint relates to denial of pretrial discovery motions.

The State countered the arguments relative to discovery by showing that pre-trial discovery of the State's evidence is not allowed in Louisiana, save un-

der certain circumstances which are not present in this case.

The State countered the arguments relative to the expert testimony by showing that the evidence was relevant and material, and therefore admissible, although perhaps only circumstantial.

The State countered the arguments relative to the chain of custody of the light meter and the copper tubing by showing that there was no evidence offered to show that the evidence had been tampered with during the time it was not attended, that the circumstances did not indicate any opportunity for it to have been tampered with, and that the "breaks" in the chains of custody were not such as would render the evidence inadmissible. The same was true of the hacksaw, with the additional element that it was not found until the air conditioners were seized from the truck and the State was therefore not charged with its custody until that time.

The State countered the arguments relative to unlawful search, arrest and seizure by showing that there was no search, arrest or seizure until such time as there was probable cause for same. Use of the flashlight to look into the truck is within the Open View doctrine, and did not constitute a search. Taking of the serial numbers was not a "search"; but if it was, it was not unreasonable in light of the circumstances present at the time this was done. And at the time of the actual seizure of the evidence from the truck, there existed full probable cause for arrest and search.

The early events at the service station did not amount to an arrest. There was originally only on-the-scene investigation which was both non-accusatory and non-custodial. By the time anything which might be found to be "mild detention" had occurred, the circumstances had changed so as to justify mild detention. And by the time anything had happened which might have amounted to an arrest, probable cause was firmly established.

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MAY IT PLEASE THE COURT:

Petitioners herein seek review of the ruling of the Louisiana Supreme Court in the case of *State of Louisiana vs. Ralph Jones and Donnie B. McManus*, ____ La. ____; 267 So.2d 559 (1972), in which their conviction of the crime of Theft was sustained. The facts of the case are as follows:

STATEMENT OF THE CASE

At about 3:00 AM on August 20, 1970, Mrs. Larry Danial was awakened by the barking of neighborhood

dogs. Looking out the front window of her house, she observed a young white man in a light colored shirt running from the unoccupied new house across the street from her residence. A U-Haul panel truck came slowly down the street, picked up the young man, and departed. She did not see who else might have been in the truck.

Mrs. Danial telephoned the Shreveport Police Department to report the incident, and Officer, E. R. Turner, patrolling nearby, was assigned by radio to investigate. Officer Turner obtained a brief statement from Mrs. Danial, radioed a description of the truck, and returned to obtain further details from Mrs. Danial.

A few minutes later, approximately 3:15 AM, Officer T. J. Robertson observed a U-Haul panel truck approaching Louisiana Highway #1 on the Flournoy-Lucas Road, and determined to observe the truck to see if there was any indication of suspicious activity.

The Flournoy-Lucas Road is a main traffic artery across the southern boundary of the city. On the western side of town, it crosses I-20, travelling south for about a mile, and then turning eastward. From there, it traverses the southern edge of the Huntington Park Subdivision at the southwest part of town, crosses through the Southern Hills area in the south-central part of town, and proceeds on to La. 1 on the southeast side of town. In the vicinity of the intersection of the Flournoy-Lucas Road and La. 1, the northern edge of the right-of-way of the Flournoy-Lucas Road forms the southern boundary of the city. The roadbed is outside of the city.

Officer Robertson observed the truck turn south from the Flournoy-Lucas Road onto La. 1, and followed. He did not chase the truck, nor did he use his siren or emergency light. He made no attempt to halt the truck — he merely followed. The truck finally pulled into a Fina service station about a half mile south of the city limits. Officer Robertson pulled in behind the truck a few seconds later. The time was then approximately 3:20 AM. Officer Robertson was then possessed of the following information:

1. A prowler had been reported in the Southern Hills area.

2. The prowler left Southern Hills in a U-Haul panel truck.

3. He observed this U-Haul panel truck travelling on the Flournoy-Lucas Road, coming from the direction of Southern Hills, a few minutes after the prowler report.

4. At this hour, it was unlikely that a great many U-Haul panel trucks would be about.

Officer Robertson made a radio report that he had observed this truck and was following it into the Fina station. Officers J. L. Humphrey and H. R. Kemper heard this report; and, knowing that Officer Robertson was in a "one-man" patrol unit, they proceeded to the Fina station in order to render assistance if needed. This is standard procedure in the Shreveport Police Department.

Officer Robertson approached the U-Haul truck and inquired as to the identity of the occupants. Two young men identified themselves as Ralph Jones and Donnie B. McManus. A third occupant, later identified as Johnny Beaird, was said to be in the restroom.

Officer Robertson, suspicious that this was the truck involved in the prowler incident in Southern Hills, inquired as to the contents of the truck. He was told that it contained air conditioners. He then went to the rear of the truck and looked through the windows in the rear door, assisted by his flashlight. In the truck he observed what appeared to be air conditioning compressor units of the type used in houses equipped with central air conditioning. The units were partially covered with furniture pads, but Officer Robertson was able to observe that the copper tubing protruding from the units appeared to have been cut. Ordinarily, such units are disconnected by unscrewing the couplings in the copper tubing.

At approximately 3:25 AM, Officers Humphrey and Kemper arrived at the Fina station. They found Officer Robertson inquiring of Jones and McManus where they had obtained the air conditioners. Officers Humphrey and Kemper did little more than observe throughout the events at the Fina station, but were present when Jones and McManus gave Officer Robertson the explanation that they had purchased the units from an unknown man at around midnight at the Cotton Bowl Lounge, a bar and pool hall on Southern Avenue near downtown Shreveport.

Officer Robertson then inquired as to the authority by which these two men possessed the U-Haul truck. They were unable to produce rental papers for the truck, but Jones stated that it was rented to a neighbor of his and that the man had loaned the truck to Jones for the evening.

Officer Robertson had now become highly suspicious of this truck and its occupants and cargo; but he was uncertain what he should do. He knew that he was outside the City of Shreveport. After conferring with officers Humphrey and Kemper briefly, he radioed for supervisory assistance.

At this point, Officer Robertson may have still been holding Jones' Driver's License. Jones testified that the officer took it when he first arrived at that Fina station, and never did return it. Officer Robertson stated that he did look at it, but does not remember whether he kept it the entire time or gave it back then and recovered it later.

At approximately 3:35, Sergeant Whitney arrived at the Fina station in response to Officer Robertson's call for supervisory assistance. He was followed momentarily by Sergeant Richardson; but Sergeant Richardson departed when he found that Sergeant Whitney was handling the situation.

Another five minutes or so elapsed while Officer Robertson explained all of the circumstances to Sergeant Whitney. During this time, Officer Robertson stated to Sergeant Whitney that he wanted to arrest

Jones and McManus. Sergeant Whitney, however, explained to Officer Robertson that they were outside the city and had no concrete information that a crime had been committed.

At about this time, it was discovered that the third occupant of the U-Haul truck had apparently slipped out of the restroom and departed unnoticed. This further suspicious circumstance renewed Officer Robertson's resolve to arrest Jones and McManus, but again Sergeant Whitney would not allow it. Sergeant Whitney then ordered Officer Robertson to let the two be on their way.

Officer Robertson then inquired of Jones whether he could bet the serial numbers from the air conditioners prior to departure. Jones consented to this, and opened the truck for Officer Robertson. Jones and the officer the both entered the truck, and Jones assisted Officer Robertson in getting the serial numbers. Officer Robertson then got out of the truck, and was about to send the two on their way when Officer Turner called Officer Robertson by radio.

While waiting for supervisory assistance to arrive, Officer Robertson had radioed to Officer Turner and asked that he check the neighborhood to see if any air conditioners were missing. Officer Turner checked the house across from the Danial's and found nothing amiss. However, he knew that a few days previously an air conditioner had been stolen from a newly completed but unoccupied house on Bayonne Street, some five or six blocks south of Frostwood Drive where the Danial's lived.

Going to the Bayonne Street address, Officer Turner found that there was no air conditioner unit at the house at which the prior theft had occurred. He also found that one was missing from another house down the street. And he was aware that the unit which had been stolen previously had been replaced the next day by the builder, Shreve Land Co., Inc. This was what he reported to Officer Robertson.

Again, Officer Robertson requested permission to arrest Jones and McManus. This time, Sergeant Whitney felt that there was probable cause for an arrest, but still did not know what to do about the jurisdictional problem. He therefore telephoned police headquarters, and conferred with Detective M. E. Ogburn.

After hearing the full particulars, Detective Ogburn instructed Sergeant Whitney to see if Jones and McManus would come to police headquarters voluntarily to get the matter of the ownership of the air conditioners straightened out. Both of the men agreed, and all left for the police station. They arrived at police headquarters at approximately 4:10 A.M.

Officers Humphrey and Kemper went about other business, and had no more to do with the case. Sergeant Whitney took Jones and McManus to Detective Ogburn's office, and then departed to make out his reports. Officer Robertson went to Central Records and began looking for the reports on the prior theft of the air conditioner from Bayonne Street. Officer Turner was continuing his investigation on Bayonne Street.

Detective Ogburn placed Jones and McManus in separate rooms, and inquired of their identities and their possession of the air conditioners. He received essentially the same story from each, and then left them alone while he did some preliminary checking on their stories.

Officer Robertson soon found the reports for which he was looking, and he found that the serial number if the air conditioner which had been stolen previously was only one digit different from that of one of the units found in the truck. He then telephoned Mr. Jim Nowery, of Shreve Land Co., Inc., and was informed that the number on the unit in the truck was the number of the unit which his company had used to replace the unit stolen previously. This was reported to Detective Ogburn by Officer Robertson at approximately 4:50 A.M. The time elapsed was due to the fact that Mr. Nowery had had to go to his office to check the serial numbers on his air conditioning units. Detective Ogburn then immediately placed Jones and McManus under arrest, advised them of their rights, and asked whether they wished to make a statement. Both claimed their right to remain silent, and the interview was terminated. Both were then booked and printed.

At the time they were being printed, Officer Turner arrived at headquarters. He had in his possession a light meter which had come from one of the houses on Bayonne Street. He found the meter lying in the yard of the house, placed it on the front porch while he completed his search of the area, then recovered the meter and took it to headquarters. He turned it over to

Detective Ogburn, and Detective Ogburn turned it over to the Identification Bureau where Sergeant Taylor found and lifted a latent palm print.

Sergeant Taylor turned the print over to Sergeant Hood, who matched the print to the palm of Donnie B. McManus, prepared a "blow-up" of the prints for courtroom use, and later testified as to the nine points of identity which he had marked on the exhibit.

At 6:00 AM, Detective Ogburn turned the investigation over to Captain Leo Hack, who was replacing Ogburn on shift change. Captain Hack again advised Jones and McManus of their rights, found that they still did not wish to make a statement, and turned them over to the City Jailer to await transfer to the Parish Jail.

Captain Hack then directed the seizure of the air conditioners from the truck, which was parked on the police parking lot outside the headquarters building. During this seizure, Captain Hack found a hacksaw on the floor of the truck, which he subsequently turned over to Mr. Ray Herd, Director of the Northwest Louisiana Criminalistics Laboratory. He also disconnected the remains of the copper tubing from the air conditioners and turned those over to Mr. Herd.

Later in the day, a warrant issued for the arrest of Johnny Beaird, and a few days later a Bill of Information was filed in the First Judicial District Court of Louisiana charging all three with the crime of Theft, in a felony grade, alleging the theft of the air condi-

tioners from Shreve Land Co., Inc. Some days later, it was learned that the second air conditioner was in fact the property of B. Kenny Taylor, Inc., and had come from a newly completed but unoccupied house in the Huntington Park Subdivision (at the western end of the Flournoy-Lucas Road). Thereafter, amended Bills of Information were filed to correct this error.

Johnny Beaird, through retained counsel, succeeded in obtaining a severance, and subsequently entered a plea of Guilty of Theft, in a misdemeanor grade, hence he is no longer a part of these proceedings.

Ralph Jones retained counsel for himself, but was subsequently unable to pay the fee required. His counsel moved to withdraw, but noted that he was willing to stay on the case as Court appointed counsel. He was therefore appointed by the Court to represent Jones. Donnie B. McManus was represented throughout by Court appointed Counsel.

Prior to the severance of Johnny Beaird, all three moved to quash the Bill and suppress the evidence, alleging illegal search, seizure and arrest. Trial of these motions was had, and a ruling was rendered by the Honorable C. J. Bolin, Jr., Judge of the First Judicial District Court, in favor of the State, to which rulings defendants Jones and McManus reserved and perfected Bills of Exception. The opinion of the Court in that ruling was made part of petitioner's application herein, and is made a part hereof by reference. It is found, beginning at page 32 of the petition.

Other motions by counsel were deemed satisfied, and form no part of these proceedings.

Finally, counsel filed certain discovery motions, some of which were deemed either moot or satisfied, and some of which were denied. Those denied also form part of these proceedings, and refer specifically to the Court's denial of formal order granting defendants a right to inspect the hacksaw, copper tubing and palm print.

Following denial of the discovery motions (formally), defense counsel were taken to the crime lab and given an opportunity to view the hacksaw and copper tubing, and to speak with Mr. Herd, who performed the analysis on them. Thereafter, arrangements were made for counsel to visit the Shreveport Police Department, with the State's permission to view the palm print exhibits. The State is not aware whether counsel took advantage of this opportunity.

During trial of the case on the merits, counsel again urged illegality of search, seizure and arrest, vigorously cross-examining the police officers who were present at the Fina station, in an attempt to show that the officers had in fact effected an arrest at the Fina station.

Also during trial, counsel objected to the introduction of the hacksaw and copper tubing into evidence, contending that the chain of custody of the evidence was not established because these articles had lain in the unlocked truck for some time before they were properly recovered and tagged.

Counsel further objected to introduction of the light meter because Officer Turner had placed it on the front porch of the house for a brief period while he continued his search of the premises.

Finally, counsel objected to testimony by Mr. Herd. Mr. Herd testified that the copper tubing had been cut by a saw, and that the teeth of the hacksaw found in the truck contained copper fragments. Mr. Herd could not say that this particular saw was the one used to cut the tubing, nor could he say that the copper fragments in the saw came from the copper tubing.

Each of these matters was resolved in favor of the State during trial, and defense counsel reserved and perfected Bills of Exception to these rulings. Certain other objections raised during trial now appear to have been abandoned.

On appeal to the Louisiana Supreme Court, each of these matters was again urged by the defense, both in brief and in oral argument. Again, each of these issues was determined in favor of the State, as will appear from the opinion of the Louisiana Supreme Court, which is reported at 267 So.2d 559.

ARGUMENT OF THE CASE

THE DISCOVERY MOTIONS

Defense counsel again urge that they should have been allowed formal discovery of the State's evidence. The Louisiana Supreme Court has repeatedly refused

to open broad discovery in criminal cases; and both the trial Court and the State Supreme Court relied upon the ancient line of state jurisprudence, bringing it forward to as recently as *State v. Mitchell*, 258 La. 427; 246 So.2d 814 (1971); Rehearing Denied May 3, 1971. That same matter was before this Honorable Court later that year, and these rulings sustained. See *H. Lane Mitchell v. State of Louisiana*, Stay Order Denied, 403 US 903; 91 S.Ct. 2200; Writ Denied, ____ US ____; 92 S.Ct. 561, December 20, 1971.

Before the Louisiana Supreme Court, counsel urged that Court's decision in *State v. Migliore*, 261 La. 722; 260 So.2d 682 (1972), and again urges that decision before this Court. But the Louisiana Supreme Court declined to apply that decision, which involved a substance of which possession was prohibited and made criminal by virtue of its chemical composition, to the instant case. In the instant case, possession of the items sought in the discovery motion would not be criminal unless the possession was by unlawful means. The *composition* of the items did not make their possession criminal.

Nor does this case involve the situation upon which is based the decision in *Brady v. Maryland*, 373 US 83; 83 S.Ct. 1194; 10 L.Ed.2d 148 (1963), for there was no suppression by the State of any evidence favorable to the defense — there was merely a denial of pretrial discovery of the State's evidence (on a formal basis). All of the evidence sought by the defense was presented by the State at trial, and the jury's verdict clearly indicates that none of it was favorable to the defense.

This Court has consistently refused to apply federal discovery rules to prosecutions in the State courts, properly leaving the matter of discovery in criminal cases to the legislatures of the several States. It is respectfully submitted that the same ruling should obtain herein.

CHAIN OF CUSTODY OF THE EVIDENCE

A. *The Light Meter* — The question of the chain of custody of the light meter presents a factual determination in which the ruling of the trial Court and of the Louisiana Supreme Court was in favor of the State. Officer Turner positively testified that he placed the light meter on the porch of the house while he searched the remainder of the premises. He then returned to the porch and picked up the light meter. The sole question presented by the defense is whether leaving the meter on the porch for a few minutes is a break in the chain of custody such as would render the meter inadmissible in evidence.

In dismissing this argument, the Louisiana Supreme Court, at 267 So.2d 565, stated:

> "This argument is frivolous. Although the officer did not have the light meter in his hands, he was at the residence completing his investigation. This was during the early morning hours, and the residence was unoccupied."

It is submitted that this ruling is entirely correct, particularly in view of the fact that no evidence was

presented which would indicate that the meter had been tampered with.

B. *The Hacksaw and Copper Tubing* — Again, a similar break in the chain of custody is alleged as rendering the evidence inadmissible. Upon arrival at police headquarters, the U-Haul truck was parked on the lot. Nothing was taken from it at the time, nor was there any further attempt to look into the vehicle or to search it. But upon formally arresting Jones and McManus, after having learned that one of the air conditioners had been stolen during the past twenty-four hours, Captain Hack then seized the air conditioners (with their copper tubings still attached), which he found still in the truck. No evidence was offered that the truck had been disturbed in any way during the interim. And it was at this time that the hacksaw was first discovered. The State had no opportunity to account for the custody of the hacksaw prior to this time because it was not aware of the existence of this evidence prior to that time. And the custody of all items was fully accounted for beyond that time.

In absence of evidence that the truck or its contents had been molested during the time the truck was unattended, the mere fact that it was unattended is no more a break in the chain of custody of the evidence than was the leaving of the light meter on the porch.

It is therefore submitted that the light meter, hacksaw and copper tubings were properly admitted in evidence, and that the rulings of the Courts below as to the admissibility of the items was correct.

THE EXPERT TESTIMONY

Upon trial of the case, the State called Mr. Ray Herd, Director of the Northwest Louisiana Criminalistics Laboratory, to testify as to his analysis of the hacksaw blade and the copper tubing. His testimony was that the copper tubing had been sawed through, and that the hacksaw blade contained copper fragments. The defense objected to this testimony for several reasons, all of which were referred to the weight of the evidence rather than to its admissibility.

First, the State did not show that the saw belonged to the defendants. Defense counsel also urge that the saw could have belonged to the owner of the truck. But the question is not who owned the saw — the question is was the saw in the truck which was in the *possession* of the defendants. This was affirmatively shown, thus establishing the relevance and materiality of the evidence. It was therefore admissible, although circumstantial.

Next, it is urged that the State did not check the saw for fingerprints. But this does not render the saw inadmissible — the State did show that the saw was in the possession of the defendants.

Next, the defense urges again the alleged break in the chain of custody of the saw. That matter has been previously answered; and the State will not belabor the point further.

Next, the defense urges that the air conditioners were not processed for fingerprints. Again, the State did show that the air conditioners were in the possession of the defendants, and it matters not whether the units were dusted for prints.

Finally, the defense complains that all of this evidence and the testimony of Mr. Herd should have been disallowed because Mr. Herd was unable to testify that the copper tubing had been sawed with that particular saw or that the copper fragments in the saw blade came from that particular copper tubing. But the State did show that the tubing had been cut by a saw, and that the defendants were possessed of a saw with copper fragments in its teeth.

A conviction which rested on that testimony alone might be reversible for failure of the circumstantial evidence to overcome every other reasonable hypothesis. But this relevant, material and competent circumstantial evidence was not the sole basis upon which rests this conviction. Circumstantial evidence is not rendered inadmissible merely because it is not conclusive. If it is relevant and material, it is admissible and may be weighed by the jury in determining the guilt or innocence of the accused. This is clearly the situation with regard to the physical evidence in this case, and the State respectfully submits that the rulings of the Courts below were correct.

ARREST, SEARCH AND SEIZURE

It is necessary to this portion of the case to determine when a search, if any occurred; and when the

defendants were arrested. The State maintains that the arrest occurred at police headquarters, and that the search and seizure occurred at that time. The defense complains of unlawful arrest and search at the Fina station.

Was There A Search at the Fina Station? — There are two times at which a "search" at the Fina station may have occurred — when Officer Robertson looked through the window and saw the air conditioners, and when Officer Robertson obtained the serial numbers of the units.

Looking through the windows of the truck, even with the aid of a flashlight, did not constitute a search. This is squarely in point with the "Open View" doctrine, as set out in *Williams v. U.S.*, 404 F.2d 493 (5th Cir. 1968) and in *United States v. Lee*, 274 US 559; 47 S.Ct. 746; 71 L.Ed. 1202 (1927). This leaves only Officer Robertson's taking of the serial numbers which might constitute a "search".

Officer Robertson did go into the truck to obtain the numbers, but he did so with Jones' consent and assistance. If this did amount to a "search", it was not such an unreasonable search as is prohibited by the Fourth Amendment. It was lawful and reasonable, according to the standards stated in *Cotton v. U.S.*, 371 F.2d 385 (9th Cir. 1965) and in *Pasterchick v. U.S.*, 400 F.2d 696 (9th Cir. 1965).

In *Cotton*, at page 392, the Court stated:

> "... a local police officer is in a very real sense a guardian of the public peace and he has a

> duty in the course of his work to be alert for suspicious circumstances, and, provided that he acts within constitutional limits, to investigate whenever such circumstances indicate to him that he should do so.' *Frye v. United States,* 9th Cir., 1953, 315 F.2d 491, 494. . . ."

And at page 393:

> "We have no doubt that here, even if a mere opening of the door to look at the number was a search, it was a reasonable one. . . ."

And in *Pasterchick,* at page 698:

> "As noted previously the agents also obtained the engine and serial numbers of the Thunderbird by raising the hood of the car and by opening the left front door. Under similar circumstances, our Court has previously held that 'even if the mere opening of the door to look at the numbers was a search, it was a reasonable one.' *Cotton v. United States.* . . ."

The taking of the serial numbers of the air conditioners in the instant case was no different from the taking of the serial numbers of the automobiles in *Cotton* and *Pasterchick.* In all cases, the stolen items were in plain view, and the officers had reasonable cause to believe the items to be stolen. Remember that at the time Officer Robertson took the serial numbers, he had reason to believe that Jones and McManus had recently been in the Southern Hills area, they were in possession

of a rental truck that was not rented to them, they had given a suspicious story as to how they came to be in possession of the air conditioners, one of the three occupants of the truck had stolen off into the night, and Officer Turner had reported that two air conditioners were missing from the Southern Hills area.

It is therefore submitted that if there was a "search" at the Fina station, it was lawful because it was not an unreasonable search. But it was also lawful because Jones, who had possession of the truck, consented to the taking of the number, opened the door for the officer, and assisted him in getting the numbers.

The other possibility — that the "search" may have been lawful as incident to a lawful arrest — will be taken up after the matter of the arrest.

Where did the Arrest Occur, and When? — Jones and McManus stated that they were placed under arrest while at the Fina station; but even their testimony as to this was conflicting, and Jones was impeached as a witness when he "could not remember" a prior conviction for theft and sentence of 90 days.

Whether there was an arrest at all at the Fina station is in serious doubt. There was very little there in the way of indicia of arrest. There was no physical restraint. No one testified that any force was used to insure that Jones and McManus remained. Neither Jones nor McManus requested to leave. All of the officers testified that they probably would not have tried

to keep them from leaving. (Naturally, the officers admitted that did not know what they would have done had Jones and McManus tried to leave, but the question did not arise at the time because neither tried). The officers used no weapons. Their statements and demeanor was not such as would have indicated to an ordinary person that he was under arrest — under suspicion and investigation, certainly, but not under arrest — yet.

True, Officer Robertson finally decided that Jones and McManus *should* be arrested, but before making the arrest he sought supervisory advice and was denied permission to arrest. Clearly, then, there was no arrest at the Fina station, at least not prior to Officer Turner's report of missing air conditioners. At most, up until after Sergeant Whitney's telephone conversation with Detective Ogburn, there was only on-the-scene investigation of a reasonable nature such as is specifically permitted under the decisions in *Miranda v. Arizona*, 384 US 436; 86 S.Ct. 1602; 16 L.Ed.2d 694 (1966) and as clarified in *Arnold v. United States*, 382 F.2d 4 (1967) and cases cited therein. There *may* have been some "mild detention" up to that point, but certainly no *arrest*.

And even beyond that point, the testimony of Sergeant Whitney denies the making of an arrest — he did not force Jones and McManus to go to the police station — he asked them if they would do so voluntarily and they did. The arrest was made by Detective Ogburn, at police headquarters, after the ownership of one of the air conditioners had been determined and it had been determined that the unit had been stolen recently.

But assuming *arguendo* that the arrest did occur at the Fina station, its timing must be ascertained.

When Officer Robertson first arrived, he certainly made no arrest. He merely asked neutral, non-accusatory and non-custodial questions, such as have been permitted under decisions in *Arnold v. U.S.*, 382 F.2d 4 (9th Cir. 1967); *U.S. v. Gibson*, 392 F.2d 373 (4th Cir. 1968); *U.S. v. Thomas*, 396 F.2d 310 (2nd Cir. 1968); and *U.S. v. Montes*, 421 F.2d 215 (5th Cir. 1970). But at this time, Officer Robertson did have at least some cause to be suspicious of this truck and its occupants. And each answer he received from Jones and McManus increased that suspicion sufficiently to justify the next question, until finally there was more than sufficient probable cause to sustain an arrest.

It is clear that there was no arrest in the early stages of events at the Fina station. Nor did the arrival of Officer Humphrey and Kemper constitute and arrest — they never did anything while they were there — they merely observed. Nor did the arrival of Sergeant Whitney constitute an arrest — he did not even know what the situation was when he arrived — and after he learned what the situation was, *he forbade an arrest by Officer Robertson.*

If there was an arrest at the Fina station, it did not occur until after Officer Turner's radio report of missing air conditioners. Until that time, Sergeant Whitney was still forbidding Officer Robertson to make an arrest. However, after that time, Sergeant Whitney himself decided that there was probable cause for an ar-

rest, but sought advice from the Detective Division as to what to do about the jurisdictional problem.

At this point, Sergeant Whitney probably would not have let Jones and McManus leave before his conference with Detective Ogburn, but this is speculative and merely academic anyhow. Jones and McManus still did not try to leave or ask to leave. But this might be considered the point of the "arrest" if it came at the Fina station. Or it might be considered to have occurred after the conversation, when Sergeant Whitney asked the two men to come to police headquarters. But in either case, the officers were then in possession of probable cause to believe that a felony had been committed and that Jones and McManus were the felons. This is sufficient to justify an arrest by police officers acting officially, but these officers were outside their jurisdiction. It is therefore necessary to inquire whether they could arrest as private citizens.

Louisiana's statute governing arrests by private citizens is found in Section 214 of the Louisiana Code of Criminal Procedure, and reads as follows:

> "A private citizen may make an arrest when the person arrested has committed a felony, whether in or out of his presence."

The cases decided by the Supreme Court of Louisiana under this statute are not numerous, and almost all are in civil suits grounded in false arrest. But these cases have developed one additional requirement not specifically stated in the statute — there must be sub-

sequent proof of the felony. The basic decision, cited in nearly every subsequent case, was *Dunson v. Baker*, 144 La. 167; 80 So. 238 (1919), in which the Court stated, at page 239:

> "A citizen may arrest on reasonable suspicion of a felony. But in such case he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed. . . ."

The officers were here confronted with circumstances totally sufficient to meet the test of probable cause, and thus needed only to follow through at trial by proving the felony. The verdict of the jury sufficiently demonstrates that this proof was presented.

It is therefore respectfully submitted that if there was an arrest at the Fina station, that arrest was valid as a lawful citizens arrest.

Finally, if the arrest was valid, then the taking of the truck and its contents (seizure of the evidence) to the police station was also valid as having been incident to a lawful arrest.

CONCLUSION

The State of Louisiana is not required to give the defense formal discovery of the State's evidence. *State v. Mitchell*, 258 La. 427; 246 So.2d 814 (1971); Rehearing Denied May 3, 1971; Stay Order Denied, 403 US 903; 91 S.Ct. 2200; Certiorari Denied, ____ US ____; 92 S.Ct. 561 December 20, 1971.

The mere leaving of a light meter on the front porch of an unoccupied house in the early hours of the morning while the officer completed his search of the premises, in absence of evidence that the meter had been tampered with during the interim, does not constitute such a break in the chain of custody as will render the meter inadmissible at trial. Similarly, there is no break in the chain of custody of air conditioners, copper tubang and a hacksaw contained in a truck which is left unattended for a time on the parking lot at police headquarters.

Testimony by an expert witness to the effect that copper tubing had been sawed in two, and that a hacksaw contained copper fragments in its teeth, is not rendered inadmissible merely because the expert cannot testify that the copper tubing was cut with the particular saw in question nor that the copper fragments in the saw came from the particular copper tubing in question when other evidence shows that the copper tubing and the hacksaw were found in a truck in possession of the defendants.

When copper tubing which has been sawed through, and a hacksaw with copper fragments in its teeth are found in the possession of the defendants, and it is further shown that air conditioners have been stolen by sawing through their copper tubing connections, and the copper tubing first mentioned above is shown to have come from air conditioners found in the possession of the defendants, it is not necessary to show the ownership of the hacksaw in order to render it admissible as evidence against the defendants.

Looking into a motor vehicle by shining a flashlight through its window does not constitute search or seizure.

The taking of serial numbers, under circumstances such as were present at the time Officer Robertson obtained them, does not constitute an unreasonable search.

Mere on-the-scene investigatory questioning does not constitute an arrest.

An arrest by police officers of the City of Shreveport may be valid as a citizens arrest where made outside the city limits if the officers have probable cause to believe that a felony has been committed, have probable cause to believe that the persons arrested committed the felony, and subsequently prove that the felony had been committed and that the persons arrested committed the felony.

Where a city police officer hears a broadcast description of a particular truck suspected to have been in the neighborhood wherein a prowler has been reported, and the police officer shortly thereafter sees such a truck, and where the hour makes it unlikely that other similar trucks would be about, and where the truck is seen travelling on a road which runs through the particular subdivision and is coming from the direction of the subdivision, the police officer is justified in investigating the truck, its occupants and its contents in order to determine whether this is the

same truck involved in the prowler incident, even though he goes outside the city.

A police officer, investigating as above stated, upon learning from the occupants of the truck that the truck contains air conditioner units alleged to have been purchased from an unknown man at a bar at midnight, is justified in looking into the truck, even with the aid of a flashlight, in order to confirm the contents, and makes no search in so doing.

A police officer, looking into a truck as above stated, who observes air conditioner units partially covered by furniture pads, and notes that copper connections thereon appear to have been cut instead of uncoupled, is justified in imposing mild detention in order to investigate further and to await supervisory assistance.

A police officer, investigating as stated in the last three paragraphs, who then learns that one of the occupants of the truck has fled the scene unnoticed and without explanation, and who learns that air conditioners are missing in the area in which the prowler was reported, has probable cause to believe that a felony (either Theft or Receiving Stolen Things) has been committed and that the occupants of the truck have committed that felony.

A police officer, having probable cause as stated above, is justified in arresting the occupants of the truck; and if this occurs outside of the city, the arrest is valid and lawful as a citizens arrest.

WHEREFORE: The State of Louisiana respectfully submits that for the foregoing reasons the petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana

LeROY A. HARTLEY
Special Counsel to
Attorney General

JOHN A. RICHARDSON
District Attorney
First Judicial District of Louisiana

DAN J. GRADY III
Assistant District Attorney

Counsel for Respondent
500 Caddo Parish Court House
Shreveport, Louisiana 71101

By: _____

CERTIFICATE

I hereby certify that on the ____ day of _____, 1973, copies of the foregoing response were mailed, with sufficient postage affixed to:

Mr. Michael R. Mangham
Hargrove, Guyton, VanHook & Ramey
Attorneys at Law
867 Texas Eastern Bldg.
Shreveport, Louisiana 71101

Mr. Henry C. Walker, IV
Attorney at Law
1025 Slatter Bldg.
Shreveport, Louisiana 71101

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